

Judgments of Tokyo High Court, Fourth Intellectual Property Division

Date of the Judgment: 2005.3.3

Case Number: 2004(Ne)No.2067

Title (Case):

The case in which the injunction of public transmission of a comment was ordered and compensatory damages were awarded against the operator of a bulletin board where there was a comment infringing copyright regulations on the bulletin board

Summary of the Judgment:

The plaintiffs, the comic illustrator and the publisher, co-owned the copyright of the interview article recorded in the book at issue, published in May 2002. This interview article was reproduced on the bulletin board on the internet, which was operated by the defendant, without the plaintiff's permission. The plaintiffs claimed that the right to make the copyright work transmittable (in the case of the interactive transmission) and the right of public transmission were infringed. They asserted the injunction of making copyright work transmittable and public transmission based on the Article 112(1) of Copyright Law, and demanded compensatory damages based on Article 709 of Civil Law. The first instance court dismissed the case.

This court dismissed a part of the compensatory damages and approved the rest of the claims including the injunction. The summary of reasons are as followed;

A person who opens and operates a bulletin board on which anybody can write on over the internet has duty to take preventive measures by showing an appropriate notice in appropriate means in order to avoid comments that could infringe the copyright of others. Such a person also has the duty to be able to take an appropriate corrective measure immediately against a comment to infringe a copyright if such a comment is made. At least, when a bulletin board operator is pointed out by a copyright owner etc. about the facts of a copyright infringement, the operator should take an action immediately by inquiring the person who made the comment about the issue if possible and eliminating the comment immediately if the copyright infringement is extremely obvious.

The copyright infringement in this case was extremely easy to recognize from the comments alone. The interview article was inserted as digital information on the bulletin board and this situation was continued, so it is possible for the information to be inputted into the computers of the general public or to be printed by the general public without deteriorating. Thus, it is obvious and serious copyright infringement. The defendant could have recognized that there were comments to infringe copyright on the bulletin board immediately after receiving the notice sent by the editor in chief of the plaintiff publisher. The defendant should have eliminated the comments immediately

without inquiring to the person who made the comment. However, the defendant neither inquired to the person who made the comment nor took any corrective action, so the court determined that the defendant was taking part in the copyright infringement through either malice or negligence.

(The copyright for this English material was assigned to the Supreme Court of Japan by Institute of Intellectual Property.)

2004 (Ne) 2067 Case of Seeking an Injunction, etc. against Infringement of a Copyright Judgment rendered on March 3, 2005, Oral argument concluded on December 24, 2004 (Judgment in Prior Instance: Tokyo District Court, 2003 (Wa) 15526 of March 11, 2004)

Judgment

Appellant (Plaintiff): X' called X

Appellant (Plaintiff): Shogakukan Inc.

Appellee (Defendant): Y

Main text

1. The judgment in prior instance shall be modified as follows:
 - (1) The appellee shall not transmit by automatic public transmission or make available for transmission any of the comments presented in the oral-statements section of the list of reprinted phrases attached to the judgment in prior instance, while those comments are posted on the "Kako rogu sōko" (past log storage) (<http://comic.2ch.net/gcomic/kako/1014/10149/1014993777.html>) of the website "2 channeru" (Channel 2) (<http://www.2ch.net>).
 - (2) The appellee shall pay the appellant X' called X ("Appellant X") 450,000 yen and delay damages accrued thereon at a rate of 5% per annum from December 9, 2003 until the date of full payment.
 - (3) The appellee shall pay the other appellant, Shogakukan Inc. ("Appellant Shogakukan"), 750,000 yen and delay damages accrued thereon at a rate of 5% per annum from December 9, 2003 until the date of full payment.
 - (4) Any other claims of the appellants shall be dismissed.
2. For the first and second instances, two thirds of the court costs shall be borne by the appellee, while the remaining portion shall be borne by the appellants.
3. Paragraphs (1) to (3) of this judgment may be executed provisionally.

Facts and reasons

(The following appellations are the same as those used in the judgment in prior instance. except for "plaintiff" being replaced with "appellant.")

No. 1 Judicial decision sought by the parties

1. The appellants sought a court decision to revoke the judgment in prior instance, the following judgment, and a declaration of provisional execution.

(1) An injunction that is the same as Main text 1 (1).

(2) The appellee shall pay Appellant X 1,125,000 yen and delay damages accrued thereon at a rate of 5% per annum from December 9, 2003 (the date following the date of the service of a statement of claim) until the date of full payment.

(3) The appellee shall pay Appellant Shogakukan 1,875,000 yen and delay damages accrued thereon at a rate of 5% per annum from December 9, 2003 (the date following the date of the service of a statement of claim) until the date of full payment.

2. The appellee sought a judgment to dismiss an appeal.

No. 2 Outline of the case

1. Appellant X (cartoonist) and Appellant Shogakukan jointly hold a copyright for the articles on talks printed in the book titled "Fan bukku tsumini nureta futari – Kasumi –" (Official animation book, An incestuous couple – Kasumi –) (the "Book") published on May 20, 2002 (the date stated in the publication data section of the book; the actual publication date is late April). The appellants alleged that the appellee's act of allowing reprinting of the aforementioned articles without authorization on the online bulletin board "2 channeru" (Channel 2), which is operated by the appellee by transmitting them via automatic public transmission or making them available for transmission, constitutes infringement of the appellants' right to make available for transmission and right to conduct automatic public transmission. Under Article 112, paragraph (1) of the Copyright Act, the appellant sought an injunction against the appellee's act of making them available for transmission and transmitting them by automatic public transmission. The appellant also alleged that the appellee's failure to delete the reprinted phrases from the articles despite Appellant Shogakukan's requests for deletion caused damage to the appellants and thereby demanded payment of damages from the appellee under Article 709 of the Civil Code (including delay damages accrued thereon from the date following the date of the service of a statement of claim). However, the court of prior instance dismissed the appellants' claims.

(omitted)

No. 3 Court decision

1. Summary of the facts used as premises

Based on the "Facts used as premises" stated in the judgment in prior instance cited as above, the facts used as premises in this case can be summarized as follows:

(1) Parties

Appellant X is a cartoonist who authored a series of comic books titled "Tsumini nureta futari." Appellant Shogakukan is a publisher that published the monthly

magazine "Shoujo Komikku Cheese!" and a series of comics titled "Tsumini nureta futari."

The appellee is a company establishing and operating an online bulletin board called "2 channeru" (Channel 2)."

(2) Characteristics of the online bulletin board

A. The online bulletin board consists of more than 300 types of bulletin boards for various topics. Each bulletin board contains a series of posts, called "threads," on related topics. Each comment posted as a thread is numbered according to the time of posting. The users of the online bulletin board can post their comments to any thread on a bulletin board or create a new thread and post comments there. When the number of comments in a thread reaches a certain level, the thread will be transferred to an archive called "Kako rogu sōko" (past log storage). Any person can read any thread in "Kako rogu sōko" by following a certain procedure.

B. Any person can freely post their comments on the bulletin board at no cost via the Internet without submitting personal information, such as his/her name, e-mail address, and user ID.

C. The appellee established and has been using the "Deletion Guidelines" for the deletion of comments from the bulletin board. Said guidelines specify that any person who wants to delete any comment has to post a request to a thread on the bulletin board titled "Sakujo yōseiban" (Deletion request board) or "Sakujo iraiban" (Deletion petition board). (If there is no appropriate thread, he/she has to create one to post such request.)

D. In practice, the appellee as well as certain users called "Sakujonin" (deleter) or "Sakujoya" (deletion specialist) are entitled to delete comments. "Sakujonin" are volunteers who are entitled to delete comments on the bulletin board in accordance with the Deletion Guidelines. However, the Deletion Guidelines specify that "Sakujonin" is not obligated to delete inappropriate comments and would not be held liable for action or inaction as a deleter.

(3) Works containing articles on talks with Appellant X

A. Appellant Shogakukan edited and published the Book and started selling it from around April 24, 2002 at bookstores throughout Japan.

The 200-page Book containing an audio CD mainly targets the fans of Appellant X and his/her comic "Tsumini nureta futari" and contains, among other things, comics, novels, and articles on talks with Appellant X. The Book contains an article on a talk titled "'Tsumini nureta futari' Tanjou hiwa" (Secret story about the creation of "Tsumini nureta futari") (pp. 34 to 51 of the Book; Talk 1) and an article on another talk titled "X × B doramatikku taidan" (Dramatic discussion between X and B) (pp. 134 to 144 of the

Book; Talk 2).

B. Talk 1 contains a conversation among Appellant X, who is the author of the comics "Tsumini nureta futari," C, who was the original editor, D, who was the editor as of the time of the publication of the Book, and E, who represents the fans, about episodes related to the creation of the comics. Talk 2 contains a conversation between Appellant X and B, who is a famous voice actor, about love, work, and life.

C and D are employees of Appellant Shogakukan and participated in the talk as a part of their work as employees of Appellant Shogakukan. E and B assigned to Appellant Shogakukan their copyrights for their respective statements printed in the aforementioned articles.

(4) Reprinting of the Talks

A. The comments (the "Comments") presented in the section showing their respective comment numbers were posted to the thread titled "Minna unzari datte (Everyone is tired of it) ★ X" on the online bulletin board; and the dates on which they were posted are shown in the list of reprinted phrases attached to the judgment in prior instance. The Comments are immediately made available for transmission and transmitted, by automatic public transmission, to any person who visited the thread after each of the Comments was made. In August 2002, since the number of Comments reached a certain threshold, this thread was transferred to the archive called "Kako logu" (past logs).

B. Each comment contains the corresponding phrases presented in the section showing the content of each comment in the list of reprinted phrases attached to the judgment in prior instance.

More specifically, about Talk 1, [i] eleven consecutive posts from May 3, 2002, [ii] nine consecutive posts from May 5, [iii] ten consecutive posts from May 7, and [iv] four consecutive posts from May 12, and, also, regarding Talk 2, [v] six consecutive posts from May 13, 2002, and one more post after a while, and eighteen more consecutive posts.

C. The phrases consist of segments of Talks from the beginning to the end. As stated in the section titled "Comparison with the expressions used in the Book" in the list of reprinted phrases attached to the judgment in prior instance, some phrases contain expressions different from those used in Talks. However, all of those differences are nothing more than intentional or accidental omissions made at the time of reprinting, errors in reprinting, or duplication of phrases.

(5) Request for deletion

Editor P of "Shoujo Komikku Cheese! (Girls' comics Cheese)," who is an employee of Appellant Shogakukan sent the appellee a fax message on May 9, 2002 and an e-mail

message on May 10, 2002 and warned that keeping the Comments online constitutes infringement of copyrights and requested prompt deletion of the Comments.

In response to the aforementioned e-mail, the appellee sent a reply to Editor P by e-mail on May 12, simply stating that "such request should be posted on the 'Sakujo iraiban' (Deletion petition board)."

In response to the aforementioned e-mail, Editor P sent an e-mail to the appellee once again on May 13 and requested prompt measures. However, in response, the appellee sent a reply to Editor P by e-mail simply stating that "such request should be posted on the 'Sakujo iraiban.'"

2. Infringement of copyrights by the appellee

(1) If any comment posted on a bulletin board constitutes infringement of a copyright (infringement of the right to conduct automatic public transmission), and when the operator of a bulletin board, who created the bulletin board and has the ultimate authority to delete comments posted thereon, fails to take an action against the act of infringement as the operator who provided an online platform to post such a comment, such inaction itself could be regarded as an act of copyright infringement in consideration of the type of such infringement, the manner in which the copyright holder submitted a complaint, and the reaction of the person who made the infringing comment. In the following section, this issue would be examined in relation to the facts found in this case. The comments made before and after the Comments in question were found based on Exhibit Ko 2 and the entire import of oral argument.

(2) The comment stating "It has been a long time, but I'm going to *upu* the talks published in the fan book. Since it's a lot of text, I'm going to split up the posts instead of making it one long post. I inserted line feeds in appropriate places. X→Teacher X, Sho (初) →Initial manager, Ima (今) →Current manager, Doku (読) →Representative of the fans" was made immediately before the comment mentioned in [i] of 1 (4) B. above (No. 602 of Exhibit Ko 2) under the name "492," which is the same as the name of the person who posted a content of Talk 1. It is obvious that the phrase "*upu*" means "up" (post). Statement No. 602 was made following Statement No. 492, which includes the phrases "If a lot of people want me to *upu* (post) the talks published in the fan book, I'll post it. If a lot of people don't want me to do it, I won't."

Immediately after the series of comments mentioned in [i] above, a person named "Hanato nanashi-san," who seems to be a different person from the person who made said comments, replied that "Thank you for the *upu* (posting) of the talks. They are very interesting!!" (No. 615). In response, the person named "492," who posted Talk 1, posted, "Sorry for double posting. This is only a small part of the talks published in the

fan book. I will *upu* (post) again after a while because consecutive posting restricts my access " (No. 616).

The comment (No. 623) made prior to the one immediately preceding the series of comments mentioned [i] above includes the phrases ">492 Thank you very much. It's an exact copy..." The comment mentioned in [ii] (No. 625) starts with the introductory phrases that "I *upu* (posted) the subsequent part of the talk. I detected some omitted characters (?) in the fan book, but I *upu* (posted) the talk without any corrections." After these phrases, the subsequent part of the talk was posted.

After the series of comments mentioned in [ii], the person named "Hana to nanashi-san" posted that "Oh, no, >492 Thanks a lot. It must have been a lot of work to copy all that" (No. 636).

While the name of the person who posted the comments mentioned in [v] above is "Hana to nanashi-san," it is not certain that person is identical with the abovementioned person named "Hana to nanashi-san" or the person who called him/herself as "492."

(3) These comments were made in the thread titled "Minna unzari datte★ X." The first comment is "'Tsumini nureta futari' published in Cheese right now! Let's talk a lot about it!" According to the content of the comments mentioned in (2) above, for any person who reads these comments, it would be extremely easy to understand that almost exact copies of the articles on the talks published in a fan book, i.e., the Book, were posted without the copyright holders' consent. It must be said that, even for the appellee, who established and operates the bulletin board in question, it was easy to understand that the comments consisted of exact copies of many pages of a published book and could constitute copyright infringement.

Editor P sent the appellee a copyright infringement warning by fax as an agent or a representative of a famous publisher, i.e., Appellant Shogakukan, while clearly stating the company name, title, phone number, and fax number. The same warning was also sent by e-mail (in the warning, the editor pointed out that 18 pages of the "Fan bukku Tsumini nureta futari – Kasumi –"published by Appellant Shogakukan were entirely disclosed online; Exhibits Ko 3 and 4). Therefore, it can be said that the appellee was notified by the copyright holder that the comments posted online infringe copyrights. Moreover, Makoto Ito, the counsel attorney of the appellants, sent a warning by content-certified mail to the condominium in Kita-ku, Tokyo, at which the appellee registered his/her residency. The warning states that the copies of the Talks constitute infringement of copyrights. This warning was delivered to the residence of the appellee on July 17, 2002 (Exhibits Ko 7 and 8 and the entire import of oral argument).

(4) Any person who establishes and operates an online bulletin board on which any

users can anonymously post comments is obliged not only to take precautionary measures such as announcing appropriate instructions in a proper manner in order to prevent copyright-infringing posts, but also to promptly take appropriate remedial measures against any posts that constitute copyright infringement. At least when receiving an allegation of copyright infringement from the copyright holder, etc., the bulletin board operator is obliged to send a notice, if possible, about the allegation to the person who made the infringing comment; and, if it is very clear that copyright infringement has taken place, he/she is obliged to take prompt action such as deleting the comment in question immediately.

In this case, the copyright infringement mentioned above was very easily recognizable based on the content of the Comments. The Talks were posted as digital information on the bulletin board in question without any modifications. Since the Talks remained to be posted, it was possible for a large number of unspecified people to store the posted information on their computers, etc. or print it out without suffering any deterioration of the information. Therefore, it can be said that this was an obvious, serious type of copyright infringement. When receiving a notice from Editor P, the appellee was able to immediately recognize that some comments posted on the bulletin board in question constitute the aforementioned copyright infringement and should have promptly deleted those comments even before sending a notice to the person who posted those infringing comments. However, after receiving the aforementioned warning, the appellee failed to send a notice to the person who made those comments and also failed to take any remedial measures. On these grounds, it must be said that the appellee jointly committed copyright infringement willfully or negligently.

In view of the facts that the appellee operates and controls several hundred online bulletin boards by itself and that a huge amount of information is constantly posted on those bulletin boards every day, it is impossible for the appellee to read all of the posted information. The appellee repeatedly emphasized in the courtroom that the appellee is unable to detect every act of copyright infringement. Even in the case where this allegation of the appellee is reasonable, if such allegation has been made without taking into consideration the fact that, even after receiving a warning from the copyright holder, etc. against copyright infringement, the appellee failed to take any measures, it would be equivalent to admitting the appellee's negligence in the sense that the appellee's management system was defective or the appellee's willfulness in the sense that the appellee maintained and approved the infringement. Therefore, such allegation would not provide legitimate grounds for alleging that the appellee is not liable for its negligence or willfulness.

On these grounds, the appellee can be regarded as "a person who is infringing or who is likely to infringe (omitted) the author, copyright owner, owner of print rights" as specified in Article 112 of the Copyright Act. Therefore, it should be said that the appellee is liable for the act of tort, i.e., liable for paying compensation for the damage suffered by the appellants, i.e., the copyright holders. If it is easy for a copyright holder to request that the person who posted an infringing comment should delete such comment, it could be said that the operator of the bulletin board should not be regarded as infringing their copyrights. However, in the case of the bulletin board in question, since it is impossible to obtain information concerning the party who posted infringing comments, such as his/her real name and e-mail address, it cannot be said that it was easy to request deletion of those comments.

Regarding this point, the appellee alleged that it was possible to track the person who posted the infringing comments on the bulletin board by using IP logs. This allegation of the appellee can be interpreted to be suggesting that the person who posted the infringing comments can be identified by using the records of IP addresses. However, IP addresses would make it possible only to identify which provider was used to post the infringing comments. It is widely known that the person who posted a certain comment could be identified only if the relevant provider were to disclose personal information, which is under strict control of the provider. The aforementioned allegation of the appellee does not affect the aforementioned court decision concerning the appellee's liability for the copyright infringement.

Furthermore, since the appellee, as the operator of the bulletin board, established guidelines (Exhibit Ko 9) specifying that any request for deletion should be posted on the "Sakujo iraban" (Deletion petition board), the appellee alleged as if he/she is not obliged to receive requests for deletion through any other route. However, this is a notification route unilaterally established by the appellee and therefore doesn't have any legal effect on the appellants, who have no special interest in the bulletin board. Upon receiving a notice from a self-proclaimed copyright holder, the appellee is at least obliged to notify the person who posted the infringing comment that such notice was sent by the copyright holder and ask him/her what measures he/she is going to take as long as it is clear that the copyright holder actually exists and makes him/herself available for further communications, and if it is obvious that the posted comment is highly likely to constitute copyright infringement. While the appellee alleged that the appellee has not read any fax or e-mail messages and did not personally read any content-certified mail, which was, the appellee explained, received by his/her family, the appellee's allegation cannot be trusted. Even if it is found to be true that the appellee

cannot adequately manage his/her business because it is a one-person business and, as a result, cannot read any e-mail or content-certified mail addressed to him/her, such truth would not give the appellee any advantage when the court determines whether the appellee has tort liability, etc.

The appellee also alleged that the appellee was unable to detect copyright infringement because the appellee did not receive the Book, related to which the appellants' copyrights were infringed (the entire import of oral argument). However, as mentioned above, in view of the facts that the Book was already published and that it was easy for the appellee to check the content of the Book, the fact that the appellee did not receive the Book would not exempt the appellee from being held liable for copyright infringement.

(5) Therefore, the appellee cannot be exempted from being liable for the act of tort, i.e., copyright infringement, as a person who kept the Comments available for public transmission or took no countermeasures to remedy such situation.

3. Necessity for an injunction

As mentioned above, the Comments were transmitted via automatic public transmission. Currently, the Comments are not posted on the bulletin board and not automatically being transmitted to the general public (the entire import of oral argument). However, since it is clear that the appellee merely suspended the disclosure of the Comments to the public (Brief 1 of the appellee of the prior instance) and that the Comments could evidently be made available for public transmission in the future, it can be said that there are grounds for the appellants' claim for an injunction against the appellee's act of transmitting the Comments via automatic public transmission or making them available for transmission.

(omitted)

No. 4 Conclusion

On these grounds, the judgment in prior instance shall be modified in the form of the main text.

Tokyo High Court, 4th Intellectual Property Division

Presiding judge: TSUKAHARA Tomokatsu

Judge: SHIOTSUKI Shuhei

Judge: TAKANO Teruhisa